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No. 84-689

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1984

BRUCE POOLAW,
Petitioner,

v.

CITY OF ANADARKO, OKLAHOMA; MAYOR OF ANADARKO, CLARK McCASKILL; CITY MANAGER, ROYCE HUNTER; FORMER ACTING CHIEF OF POLICE, J. C. GIVENS; and FORMER ACTING CITY MANAGERS, BOB WILKERSON and RON MADISON,
Respondents.

REPLY TO RESPONSE BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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December, 1984

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of The United States:

BRUCE POOLAW, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States District Court of Appeals for the Tenth Circuit entered in the above entitled case on June 27, 1984.

Petitioner herein filed his Petition for Writ of Certiorari to the United States District Court of Appeals for the Tenth Circuit on October 25, 1984. Respondents thereafter filed their Response Brief in Opposition to Petition for Writ of Certiorari in November, 1984. Petitioner herewith files his Reply.

Respondents, in their Statement of the Case, attempt to show, as they did at trial, that they had cause to terminate Poolaw for reasons other than race. In this attempt to further mislead the Court, the Respondents have failed to mention that the alleged reasons which they give for having terminated Poolaw's employment were determined, on two different occasions by two different fact-finding bodies, and that both found in favor of Poolaw and against the accusers.

The point Respondents ignore and the trial court and lower appellate Court erred in their decision regarding, was that:

1. Poolaw was fired;

2. Poolaw pursuant to law was given a hearing;

3. The Policeman's Board of Review (set up by the City of Anadarko, itself) found in favor of Poolaw;

4. That the City of Anadarko failed to appeal the decision of the Board to the District Court and Supreme Court of the State of Oklahoma as specifically provided by Ordinances, Charter Provisions and State Statute; and

5. Yet Poolaw was never reinstated, when caucasions under the same procedural processes were reinstated.

The City of Anadarko had a duty, under the law, when insufficient evidence existed to support their termination of Poolaw, to reinstate him with back pay. Then, if later, the City discovered additional information to support termination proceedings, they were under an obligation to give Poolaw notice; afford him a new hearing; and pursuant to the outcome of that hearing; either reinstate Poolaw, or terminate him. They did neither, and to date Poolaw has not been reinstated.

However, Petitioner was never reinstated after the first hearing, and no new evidence, firing, notice or other proceeding established by ordinance was had by the City, and the only reasoning for this type of action by the City is discrimination.

Furthermore, Respondents flatly ignore the fact, that upon the trial of this cause, and after all evidence was submitted to a six member jury, the jury returned a verdict in favor of Poolaw in the amount of $51,004.00.

Two different hearings, held six years apart, and both found in Poolaw's favor. The Policeman's Board of Review found there was insufficient evidence to support Poolaw's termination and the jury found in favor of Poolaw under 42 U.S.C. § 1981 and § 1983 a total judgment of $51,004.00.

It is respectfully submitted, that no other conclusion can be reached, to substantiate the City's actions against Poolaw than they intentionally and without cause denied Poolaw his Civil rights, equal protection under the law and denied him due process of law, and that discrimination was the motivating factor behind these acts. Furthermore, the City continues to operate to prevent him either reinstatement or employment.

REASONS FOR GRANTING WRIT

I

CERTIORARI SHOULD BE GRANTED TO REVERSE APPELLATE COURT'S DENIAL OF TITLE VII CLAIM.

Petitioner believes that he established, without question, a prima facia case of discrimination against the Respondents herein, under Title VII, as exemplified by the jury verdict of $50,000.00 Furthermore, Petitioner believes that when the burden shifted to the Respondents to show a legitimate, non-discriminatory reason for his firing, that Respondents failed to produce such proof, and that the Trial Court and Appellate Courts erred in their decisions.

Petitioner bases his statement on the following issues:

1. Respondents submitted to the Policeman's Board of Review, before their determination on August 8, 1978, all evidence which they had to support Poolaw's firing. Based upon the evidence presented, the Policeman's Board of Review found there was insufficient evidence to support Poolaw's termination.

2. Respondents submitted to a jury, on Petitioner's 42 U.S.C. § 1981 claim, all evidence which they had to support Poolaw's firing. Based upon the evidence presented, the jury found in favor of Poolaw and awarded him $50,000.00 in actual and punitive damages against the City of Anadarko. On Cross-Appeal, the Tenth Circuit upheld the $10,000.00 actual damage award, and agreed with the Trial Court's remittitur of $40,000.00 punitive damages (which is discussed in detail later).

While Respondents attempt to brush off the conflicting decisions of the two fact finding bodies above mentioned

and the decision of the Trial Court, stating that reasonable men may differ, Poolaw believes that the trial Judge was prejudiced in his decision and committed error on the following grounds:

1. The Trial Court's conversation, reference to and his admitted agreement with a woman juror which had set on the Poolaw jury, during a voire dire examination in another case, prior to the Court's entering his final judgment in this case;

2. The Trial Court's reference to Petitioner's attorney not making a pendent jurisdiction claim, when such claim would have been improper and what the Court would have done in that event; and

3. Trial Court's outward and obvious dislike and constant castigation of Petitioner's attorney.

The Appellate Court erred in upholding the Trial Court's decision dismissing Petitioner's Title VII claim, in its review of the Trial Court's error. Petitioner submits that a close scrutiny of the entire transcript of the hearing on Petitioner's Title VII claim, by the Appellate Court, would have, without question, shown reversible error on the part of the Trial Judge, in his extraneous conversation with a juror prior to the time he had reached a final decision in this matter, as well as his prejudicial treatment of Petitioner's counsel.

Respondents had a duty and responsibility to follow the laws of the State of Oklahoma as well as the City Charter and Ordinances of the City of Anadarko. Just as they have a duty to follow State and Federal Law discouraging unfair labor and employment practices. Respondents failed to

follow City and State laws, just as they have failed to follow State and Federal Laws, prohibiting discrimination. Therefore they had no alternative but to abandon all procedural guidelines in order to achieve their ultimate goal—to get rid of the Indian.

Unless the decision of the Appellate Court and Trial Court is overturned, then the very intent of Title VII, to eliminate those practices and devices that discriminate on basis of race, color, religion, sex, or national origin, will continue to exist and all the evils that Title VII was intended to eradicate will continue.

II

CERTIORARI SHOULD BE GRANTED REINSTATING JURY AWARD OF PUNITIVE DAMAGES IN THE AMOUNT OF $40,000.00.

Poolaw reasserts his contention that the Appellate Court erred in upholding Trial Court's decision striking $40,000.00 in punitive damages which the jury awarded against the City of Anadarko, under 42 U.S.C. § 1981, concluding that punitive damages are not recoverable against a Municipality.

It is well settled that actual and compensatory or punitive damages may properly be awarded private Plaintiffs when suing under 42 U.S.C. § 1981, even when coupled with a Title VII claim. However, the law is still unsettled and at the best unclear, as to whether or not punitive damages should be awarded against a Municipality.

There is nothing inherent in Civil Rights cases, which *specifically precludes* an award of substantial punitive dam-

ages in appropriate instances under 42 U.S.C. § 1981. In determining the appropriate amount of punitive damages in such actions, the Court may look to punitive damage awards in other *intentional tort* cases.

The argument that because Congress was *silent* with reference to punitive damages against municipalities, that it therefor *meant* that punitive damages should be disallowed, is both presumptive and faulty. There are no notes which indicate that this was the intention of Congress, and that Courts are prohibited from allowing punitive damages in even the most heinous cases.

Judge O'Conner's opinion in the case from the District of Kansas, *Boyd* v. *Shawnee Mission Public Schools*, 522 F.Supp. 1115 (1981), was that:

> "The historical analysis and consideration of competing social policies relied on by the Court in its § 1983 cases are not found in the § 1981 area. The same preservation of traditional municipal immunity found by the *City of Newport* Court in the deliberations of the 42nd Congress with regard to § 1983 cannot be imputed to the legislators enacting § 1981."

Respondent's rely heavily on the case of *City of Newport* v. *Facts Concerts, Inc.*, to support their position. However, Petitioner believes that Judge O'Conner's opinion is thorough, incisive and well thought-out, and in complete agreement that that same governmental immunity established under § 1983, should not be imputed or construed to include § 1981.

Petitioner respectfully submits, to disallow punitive damages, based upon the faulty and presumptive reasoning of Respondents, *without guidelines or exceptions*, will serve

only to provide a vehicle for government officials, acting under the guise of municipal immunity, to commit wrongs against individual members of the community, in denial of their civil rights, without any fear of retribution whatsoever.

The Appellate Court states that punitive damages are intended to punish wrongdoers; unless the wrongdoer is a municipality, then punitive damages should not lie; but must focus on the Municipal Officials who have engaged in the prohibited discrimination. Petitioner states that *the City is its duly elected and appointed officials*, because without such officials the City could not function. There are no set guidelines as to what constitutes the acts of the City, as opposed to what constitutes acts of its servants, agent and employee. Petitioner contends, that when City Officials, acting in the scope of their employment, as the servants, agents and employees of the City, that *they are the City*. Especially when two or more officials enter into a conspiracy to commit wrongs against an individual, as in the case at bar.

Further, there is no question, and it is well settled that punitive damages can and should be assessed against any private corporation that denies a person his Civil Right, and that said private corporation is directly responsible for the acts and conducts of its agents, servants and employees. Why should a municipality be any diffrent?

Respondents have asserted and the lower Courts have held that punitive damages against a City, hurts only the innocent taxpayer. Using this same rationale, it could be stated that to award punitive damages against a private corporation should be disallowed, because ultimately, the

private corporation must pass on to the consumers, also the taxpayers, its costs of paying punitive damages.

Furthermore, it was recently articulated by the Federal Government in the bail-out of the Continental Bank of Illinois, by the Federal Deposit Insurance Company, that the policy of spreading the risk to all citizens, is good, for the reasons and on the grounds that the wrongful acts of the few should be distributed among the citizens, where there is a question of public trust.

Following that same rationale, it seems omnipresently clear that § 1981, was intended and should be utilized to allow a claimant punitive damages against a municipal corporation and vis-a-vis, spread the risk on the citizens of the municipality for the purpose of insuring that all citizens, within that City, will not be denied their civil rights. What greater public trust do we have than to insure that all persons retain their civil rights.

This Court is the Court of last resort. The final decision of whether or not to allow punitive damages under 42 U.S.C. § 1981 and to restore to the citizens equal protection under the law, against racially motivated misuses of government power rests here.

III

CERTIORARI SHOULD BE GRANTED REVERSING APPELLATE COURT'S DENIAL OF A REASONABLE FEE TO SUCCESSFUL PLAINTIFF.

Petitioner further reasserts that he has been denied equal protection under the law by the Trial Court's award and the Appellate Courts upholding, of his inadequate and unfair attorneys fee award. While Respondents contend that the $20,000.00 awarded to Petitioner's counsel was more than adequate, Respondents were paid that much just for trial at the lower Court level.

Respondents proposition that the Court should ignore the jury award of $51,004.00 and base its decision upon the amount awarded Plaintiff after remittitur, ignores all the guidelines to follow in determining a fair and reasonable fee as set forth by case law.

Respondents further proposition that Petitioner was only partially successful, is the type of sophistric inbreeding which Petitioner has had to deal with throughout this case. A jury award, in a civil rights case, of $51,004.00 is hardly an unsuccessful verdict. As a matter of fact, any type of award in a Civil Rights case from a jury, is a victory.

Petitioner contends that the jury, by its award of $51,004.00 showed its intent and expressed without questions their dissatisfaction with the municipal government and its employee's behavior in this case. The jury verdict exists for all the world, regardless of whether or not a Judge allows or disallows such verdict to stand. Likewise, counsel for Petitioner was successful on both the § 1981 and § 1983, by obtaining a verdict of $51,004.00, whether or not a Judge allows or disallows such verdict to stand.

Furthermore, Petitioner believes that he was successful in his Title VII claim, but that the Court committed error in dismissing same, as previously set forth in detail.

Lead counsel for Petitioner has been in this case since October, 1978, a period exceeding six (6) years. This is the third appeal which Petitioner has had to file in an attempt to right the wrongs which have been perpetrated against him.

Low attorney fee awards in cases such as this, that have been going on for many years, is an absolute denial of equal protection under the law, since most Plaintiffs who are discriminated against, come from much lower income brackets than the companies or municipalities which commit the wrongs against them. Plaintiffs cannot afford to pay their attorneys for prosecution of their claim, the type of retainer that the big companies and municipalities are able to pay in their defense. Therefore, Plaintiff-Attorneys must rely solely upon Court Awarded fees for their time and efforts expended in a case.

Counsel for Petitioner was awarded $20,000.00 for fees in this matter. This amount will hardly cover the costs expended to date by counsel for Petitioner in the filing, discovery, trial preparation, and three appeals, which Petitioner has had to pursue in this matter.

Therefore, Petitioner respectfully requests that he be granted a fair and reasonable fee for his time and efforts in this case in the amount of $121,000.00.

Respectfully submitted,

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Suite 101
Oklahoma City, Oklahoma 73118
Attorney for Petitioner

December, 1984

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on this ___ day of December, 1984, three copies of the foregoing Reply to Response Brief in Opposition to the Petition for Writ of Certiorari were deposited in the United States Mails, postage fully prepaid thereon, addressed to counsel for Respondents, Margaret McMorrow-Love, Fellers, Snider, Blankenship, Bailey & Tippens, 24th Floor, First National Center, Oklahoma City, Oklahoma 73102.

By: .....

GROVER MISKOVSKY